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Supreme Court, U.S.
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In The

Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION IN BEHALF OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY

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QUESTIONS PRESENTED

I

Whether the Second Circuit's decision, that a request for an award of nominal damages does prevent a case from becoming moot, is in harmony with the decisions in the Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits.

II

Whether the Second Circuit's decision, holding that the changes in the Student Association's constitution and policies, made in the fall of 2003 while the case was still pending in the District Court, to comply with the viewpoint neutral criteria for distributing mandatory student activity fee money in Southworth caused the petitioners' facial challenge to the former policies to become moot, was correct.

III

Whether the Second Circuit's decision, holding that petitioner College Standard Magazine's stipulation agreeing to summary judgment in favor of the Student Association on petitioners' as applied challenge to the Student Association's vote denying funding with mandatory student activity fee money caused the case to become moot and deprived the court of a case or controversy under Article III, was correct.

IV

Whether the petitioners' claim for attorneys fees is barred by the decision in Buckhannon Board

and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598 (2001), which eliminated the "catalyst theory" for determining who is a prevailing party under the fee shifting statute.

RULE 29.6 STATEMENT

Respondent Student Association of the State University of New York at Albany is a non-profit educational corporation organized under the Not-for-Profit Corporation Law of the State of New York, and there is no stock and therefore there is no parent corporation and no publicly held corporation that owns any stock.

At the time the complaint was filed, the Student Association was an unincorporated association under the common law of the State of New York; it was incorporated after this action was commenced.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 3

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND POLICY 3

COUNTER STATEMENT OF THE FACTS 4

REASONS FOR DENYING THE WRIT 14

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS WHICH MERITS REVIEW BY THIS COURT 14

II. THE PETITIONERS' CLAIM IS BARRED BY THE BUCKHANNON DECISION 22

III. THE PETITIONER'S HAVE WAIVED THEIR RIGHTS TO CLAIM ANY INJURY AND HAVE NO STANDING 24

APPENDIX

STIPULATION OF SETTLEMENT AND ORDER 2a

LETTER BRIEF TO HON. THOMAS J. McAVOY 6a

TABLE OF AUTHORITIES

CASES — PAGES(S)

Board of Regents of University of Wisconsin v. Southworth, 529 US 217 (2000) 1, 5

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598 (2001) 21, 22, 23, 24

College Standard Magazine v. Student Assocation of the State University of New York at Albany, 610 F3d 33 (2d Cir. 2010) 3, 10, 11, 12, 13, 16

Dawes v. Walker, 239 F3d 489, (2d Cir. 2001).....17

Diesel v. Town of Lewisboro, 232 F3d 92, (2d Cir. 2000).....17

Morrison v. Board of Education of Boyd County, 521 F3d 602 (6th Cir. 2008).....18, 19

Pagan v. Village of Glendale, 559 F3d 477 (6th Cir. 2009) 18

Van Wie v. Pataki, 267 F.3d 109, (2d Cir. 2001).....17

INTRODUCTION

Petitioners, who published a newspaper entitled College Standard Magazine on the campus of the State University of New York at Albany, filed a complaint pursuant to 42 U.S.C 1983 against the Student Association at the University which contained two claims, first, that the Student Association's policies for allocating mandatory student activity fee money to recognized student organizations (RSOs) were not viewpoint neutral and on their face violated the First Amendment, and, second, that the vote by the Student Association's Central Council in February 2003 to deny the application for funding violated the First Amendment as applied because it was motivated by discrimination against petitioners' political views. In the spring of 2003 the Student Association amended and superseded its policies for allocating mandatory student activity fee money in compliance with the decision of this Court in Board of Regents of University of Wisconsin System v. Southworth, 529 US 217 (2000), which made the claim of facial unconstitutionality moot. In 2005, after the Student Association had superseded its policy, the District Court granted summary judgment in favor of petitioners on the facial challenge to the policy and the parties stipulated to nominal damages of one dollar ($1.00), even though that issue had been mooted several years before. Rather than go to trial on the only remaining claim, petitioners stipulated that the defendant Student Association was entitled to summary judgment in its favor on the petitioners' claim that the February 2003 vote violated College Standard Magazine's constitutional rights, which made the as applied claim moot. However, both

parties wished to have a decision on the merits of the issue whether the Student Association's former policies for allocating student activity fees to RSOs had been discriminatory under the First Amendment, and therefore neither party raised the issue of mootness in either the District Court or in their briefs to the Second Circuit Court of Appeals.

The Second Circuit correctly held that, although the District Court had granted summary judgment in favor of the petitioners on the facial challenge and the parties had stipulated to nominal damages of one dollar ($1.00), there was no effective remedy the court could grant with respect to the facial claim, which was probably moot even before the District Court entertained the summary judgment motions. The Second Circuit correctly held that the complaint should be dismissed because the petitioner College Standard Magazine caused the case to become moot by its conduct in entering into the stipulation consenting to summary judgment in favor of the defendant Student Association on the as applied challenge, which was the only remaining claim.

The petition for certiorari should be denied because the Circuit Courts of Appeals, including the Second Circuit, are in agreement that a request for or an award of nominal damages does prevent a case from being moot. There is no split in the Circuit Courts of Appeals which requires resolution by this Court. Furthermore, the issue sought to be raised by the petition is not fairly presented on this record, and the decision of the Second Circuit to dismiss the case on the grounds there was no longer any case or controversy was correct.

OPINIONS BELOW

The Second Circuit's opinion is reported as College Standard Magazines v. Student Association the State University of New York at Albany, 610 F3d 33 (2d Cir. 2010). The first bench decision of the United States District Court, Northern District of New York (McAvoy, J.) dated June 13, 2005, which denied the motion and cross-motion for summary judgment by both parties [A-897-912] is unreported, and the second bench decision of the United States District Court, Northern District of New York (McAvoy, J.), dated August 8, 2005, which granted partial summary judgment to petitioners on a motion for reconsideration [A–978–987], is unreported and appears as an appendix to the petition.

STATEMENT OF JURISDICTION

The petitioners seek review of the decision of the United States Court of Appeals for the Second Circuit rendered on July 1, 2010. [See 610 F3d 33; Appendix to Petition at 1a]. The Second Circuit denied petitioners' timely petition for rehearing and rehearing en banc on September 20, 2010 [A. at 18a-19a]. The mandate issued on September 25, 2010. This Court has jurisdiction under 28 USC 1254(1). However, the Second Circuit correctly dismissed the complaint because there was no case or controversy under the United States Constitution, Article III, Section 2.

CONSTITUTIONAL PROVISIONS AND POLICY

United States Constitution Article III, Section 2 provides in relevant part: "The judicial power shall

extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority....."

COUNTER STATEMENT OF THE FACTS

College Standard Magazine, a recognized student organization (RSO) at the State University of New York of Albany, published a self-described "politically conservative" campus magazine edited by a student named Scott Barea. College Standard Magazine featured National Inquirer style journalism, for example, a lengthy article by Mr. Barea entitled "Masturbation: it's a good thing" about his personal masturbation habits, how he started at age 12, frequency, personal techniques, spanking himself, and other intimate details. [A-90, A-199, A-209][1]. During the 2002-2003 academic year College Standard Magazine applied for $5,862.05 in mandatory student activity fee money from the Student Association's budget line for "new and unfunded groups" which had only $3,500.00 available left in it [A-819-825]. While making the application, Barea threatened that if the funding request were denied he would start a lawsuit against the Student Association in federal district court for violating the constitutional rights of the conservative majority on campus [A-853-854, A-556, A-574-575].

At the time of the request in February 2003 the Student Association did not have written guidelines for funding RSOs, but relied on regulations promulgated by the State University of New York

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[1] References denoted "A" are to the Joint Appendix on appeal to the United States Court of Appeals for the Second Circuit in this case.

Board of Trustees[2] and unwritten standards and practices. RSOs which had never received funding before were generally limited to an initial funding of $350.00, and in deciding whether to grant funding the Student Association considered (1) the number of students in the RSO, (2) whether the RSO was active on campus or engaged in off-campus activities, and (3) how accessible the RSO was to students in general. Although there was no written guideline prohibiting viewpoint discrimination, the Student Association had a long history of funding a large variety of small student groups and groups representing minority viewpoints including politically conservative publications on campus [A-110-194].

On February 12, 2003 the Central Council of the Student Association voted to deny College Standard Magazine's application for funding. As threatened, Mr. Berea promptly commenced a federal civil rights action alleging two basic claims, that the Student Association's policies for awarding mandatory student activity fee money to RSOs gave the Student Association unbridled discretion to discriminate against minority viewpoints and violated the First Amendment under Board of Regents of University of Wisconsin v. Southworth, 529 US 217 (2000), and that the Student Association's vote to deny funding to College Standard Magazine on February 12, 2003 was motivated by viewpoint discrimination against politically conservative views and violated the First Amendment as applied.

In the spring of 2003 the Student Association abolished the challenged funding policy including the three unwritten guidelines it had used to allocate student activity fee money. In the fall of 2002 the

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[2] See 8 NYCRR 302.14(c)(3) [A–107–109].

University administration had brought the Southworth decision of the Supreme Court to the attention of the all-student Student Association [A-552-553, A-857-859], and the Student Association was in the process to conform its policy to the First Amendment principles defined in Southworth. On May 14, 2003 the Student Association amended its constitution and bylaws and enacted new written criteria and procedures for allocating student activity fee money to RSOS which fully complied with all of the requirements concerning viewpoint neutrality in Southworth [A-74, A-340-375, A-595-597, A-617-619]

During the 2003–2004 academic year, College Standard Magazine did not apply to the Student Association for any funding from mandatory student activity fees [A-95-96]. A full academic year passed by, with another annual budget cycle for the Student Association, without any discovery or further litigation in the District Court case.

Subsequently in May 2005 the parties cross moved for summary judgment. The issue of mootness was not raised by either party, and in fact was never raised in the District Court. On June 13, 2005 the District Court held that there had been "much debate" over whether to fund College Standard Magazine's publication at the Central Council meeting on February 12, 2003, and "a fair-minded trier of fact could conclude that [SA] had a justifiable non-content based reason for denying funding". The District Court denied the parties cross-motions for summary judgment and set the case for trial [A-907–909].

The plaintiffs moved for reconsideration, and, while the Student Association's attorney was outside the country on vacation, the District Court granted College Standard Magazine's motion for summary judgment on the first claim in the complaint, holding

that three unwritten factors the Student Association had considered in making the funding allocation decisions were unconstitutional on their face in violation of the First Amendment. Specifically, the District Court held the use of such criteria as "the number of active members in a recognized student organization, whether the recognized student organization was active on campus, how accessible the recognized student organization was to students, and whether the recognized student organization was a small group who really wanted money for a party....." could be related to speech or viewpoint discrimination, and that the Student Association's funding process therefore afforded the Student Association unbridled discretion to grant or deny access to mandatory student activity fees [A–983–985].

The District Court issued an order granting plaintiff's motion for summary judgment based on the facial challenge to the three unwritten factors the Student Association employed, but the District Court did not grant any relief. The District Court did not decide the plaintiffs' second claim, that the Student Association's vote to deny funding for College Standard Magazine on February 12, 2003 was unconstitutionally motivated, and left the challenge to the Student Association's denial of funding as applied to College Standard Magazine unresolved [A-985, A-990-991]. The Student Association filed a notice of appeal to the United States Court of Appeals for the Second Circuit [A-992-993].

Staff counsel to the Second Circuit informed the parties that the appeal was premature because the as applied challenge to the Student Association's vote was nonfinal and there was no judgment that provides for any relief, and the parties therefore stipulated to the withdrawal of the appeal as

premature [A-994–995]. After a pretrial conference on June 22, 2006 and a second pretrial conference on October 16, 2006 [A-996-999], the District Court entered an amended judgment which found the Student Association's policy was deemed unconstitutional but again did not resolve the claim challenging the Student Association's vote as applied to the denial of funding for College Standard Magazine. The judgment specifically provided ".....however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practices." [A-1000].

College Standard Magazine had the option to go to trial in order to establish that the Student Association's vote to deny funding on February 12, 2003 was tainted by consideration of viewpoint discriminatory criteria or unconstitutional motivation. However, this was a burden it would have been impossible for the petitioners to sustain, because it was simply not true, and College Standard Magazine did not want to go to trial. Finally the parties entered into a Stipulation of Settlement and Order dated February 2, 2007 in which College Standard Magazine consented to entry of nominal damages of one dollar ($1.00) on the facial challenge to the three unwritten policies, and consented to entry of summary judgment in the Student Association's favor on its as applied challenge to the Central Council's vote on February 12, 2003 to deny funding for publication of the magazine. The stipulation explicitly stated that its purpose was to get a final determination on the remaining issues in the litigation so that there would be a final judgment and the case could go up on appeal [A-1003-1006].

The stipulation specifically provided for an award of nominal damages in the amount of one

dollar ($1.00) on the District Court's determination that the defendant Student Association's policies for allocating student activity fee money were unconstitutional on its face, that the stipulation as to the amount of damages was solely for the purpose of fixing the amount of damages and was not an admission of liability by the Student Association, and that ".....the purpose of this stipulation is solely to fix the amount of damages so that an amended final judgment may be issued and the constitutional issues decided in the said bench decision may be heard on appeal". Furthermore, with regard to the second claim in the complaint, whether Central Council's vote denying funding to College Standard Magazine violated the plaintiff's constitutional rights as applied, the stipulation provided that College Standard Magazine "hereby consent to entry of summary judgment in favor of defendants [Student Association]". [A-1004–1005]

The stipulation was submitted to the District Court with a cover letter stating that the purpose of the stipulation was to obtain a final judgment which would be appealable to the Circuit Court [A–1007–1009]. The District Court did not sign the stipulation, but issued another amended judgment which contained nominal damages of one dollar ($1.00) [A-1010-1013], and the Student Association filed another notice of appeal to the Second Circuit [A-1016-1017].

In their briefs both the defendant-appellant Student Association and plaintiff-respondent College Standard Magazine argued that the Second Circuit should decide the merits of whether consideration of the three unwritten factors by the Student Association violated the First Amendment on their face and allowed the Student Association unbridled discretion in allocating mandatory student activity fee

money among RSOs. The Student Association argued that the three factors -- the number of students in an RSO, whether the RSO was active on campus, and how accessible the RSO was to students -- were constitutional on their face and did not cause its decision-making to be infected by unbridled discretion. The Student Association also argued that it did not act under color of state law in distributing mandatory student activity fee money to RSOs [see Appellant's Brief and Reply Brief]. College Standard Magazine argued that the unwritten factors considered by the Student Association favored majoritarian views and imbued the Student Association with unbridled discretion to deny minority views, such as their conservative magazine, access to mandatory student activity fee money [see Respondent's Brief]. Neither Student Association nor College Standard Magazine argued mootness in their briefs to the Second Circuit, as both sides were seeking a decision on the merits of their First Amendment arguments.

The issue of mootness was raised for the first time during oral argument by the panel of the Second Circuit Judges[3]. The Circuit's decision noted that the parties' failure to raise the question of mootness in their briefs did not allow the Court to proceed because mootness is an issue of subject matter jurisdiction under Article III of the Constitution, and the courts have an independent obligation sua sponte to consider the presence or absence of a live case or controversy. College Standard Magazine v. Student Assocation of

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[3] College Standard Magazine has not provided a transcript of the oral argument in the Second Circuit with its certiorari petition. However, appellant Student Association told the Circuit Judges that this appeal was really about College Standard Magazine's effort to obtain an award of attorney fees from the students.

the State University of New York at Albany, supra, 610 F3d at 35.

The Second Circuit decision held that the Student Association's funding policy challenged by College Standard Magazine was no longer in place because the Student Association had amended its constitution in the spring of 2003 to include regulations that explicitly require viewpoint neutrality, and College Standard Magazine did not challenge the new funding policy nor argue that the former challenged policy would be reinstated. Since College Standard Magazine had stipulated to nominal damages in the total sum of $1.00 for its on the face challenge and was not seeking any injunctive relief concerning the superseded policy, the Second Circuit held that any declaration that the former Student Association funding policy was unconstitutional would be advisory only and would not provide any relief to the plaintiffs, and therefore there was no remaining dispute concerning the facial challenge to the former policy which would affect the behavior of the defendant towards the plaintiff. College Standard Magazine, supra, 610 F3d at 34-35.

The Second Circuit decision noted that after the District Court ruled in favor of plaintiff on the facial challenge, College Standard Magazine then stipulated to entry of summary judgment against them on the as applied challenge from which College Standard Magazine has not and could not appeal. By the stipulation College Standard Magazine conceded that the defendant Student Association's former funding policy had not caused the plaintiff College Standard Magazine any harm when it was in effect. College Standard Magazine, supra, 610 F3d at 34.

Further, the Second Circuit held that plaintiff College Standard Magazine had caused the case to

become moot when it entered into the stipulation consenting to summary judgment being entered in favor of the defendant Student Association on the as applied claim. College Standard Magazine, supra, 610 F3d at 36 fn. 2.

The Second Circuit concluded that plaintiff College Standard Magazine had caused the case to become moot when it entered into the stipulation consenting summary judgment be entered in favor of the defendant Student Association on the as applied claim. The only case or controversy remaining after the stipulation was the plaintiff College Standard Magazine's facial challenge to the defendant Student Association's former funding policy, which was mooted when Student Association amended its constitution in the spring of 2003.

Since the Student Association's former policy had been repealed and superseded by a constitutional funding policy, and College Standard Magazine conceded that its as applied challenge was without merit, the Second Circuit held the Court lacked jurisdiction over the appeal. "In light of the repeal of the challenged policy and the concession as to the as-applied challenge, we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction over this appeal. [Citations omitted]". The Court dismissed the appeal as moot because it was no subject matter jurisdiction over the case under Article III. College Standard Magazine, supra, 610 F3d at 35.

Finally, the Second Circuit vacated the judgment of the District Court because the actions of the plaintiff College Standard Magazine in stipulating to the entry of summary judgment against the plaintiff on the as applied challenge had caused the appeal to become moot. When the appellee has

caused the case to become moot, the Second Circuit vacates the District Court's judgment in order to prevent the appellee from insulating a favorable decision from appellate review. College Standard Magazine, supra, 610 F3d at 36 fn. 2.

In a concurring opinion Circuit Judge Calabresi stated that the case became moot on the District Court level and should have been dismissed in the District Court. The plaintiffs' facial challenge to the Student Association's funding policy became moot when the Student Association abolished the challenged funding policy in the spring of 2003, which was before the District Court had granted summary judgment on the facial challenge to the policy in September 2005. The plaintiffs' as applied challenge to the Student Association's denial of College Standard Magazine's application for funding became moot in October 2006 when the parties entered into the stipulation consenting to entry of summary judgment in favor of Student Association, which was before the District Court entered final judgment. Since the event which caused the case to become moot happened before the entry of final judgment in the District Court, Judge Calabresi stated that the case ceased to be an Article III case or controversy and should have been dismissed as moot forthwith at the District Court level. College Standard Magazine, supra, 610 F3d at 36-37.

Judge Calabresi also stated that the fact the plaintiffs' case was moot before the District Court entered final judgment foreclosed any claim that the plaintiffs were a prevailing party entitled to attorneys fees under 42 USC 1988(b). Since the case became moot before the District Court's judgment was issued, the plaintiffs were not at that stage prevailing parties. College Standard Magazine, supra, 610 F3d

at 36-37. The Per Curiam opinion stated that the Court need not determine whether the case was moot while it was pending before the District Court, as expressed in Judge Calabresi's concurring opinion, because the judgment of the District Court was vacated on the basis of the mootness of the appeal. However, the Per Curiam decision indicated that the case "may have been" moot while it was pending before the District Court, and, if it was, the court "would also be required to vacate the district court's decision for that independent reason". College Standard Magazine, supra, 610 F3d at 36 fn. 1. Accordingly, the other members of the Second Circuit panel were in agreement with the concurring opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS WHICH MERITS REVIEW BY THIS COURT

The petitioners' argument for granting certiorari is based on a fundamental misunderstanding of the Second Circuit's decision, or an intentional effort to conjure up a conflict amongst the Circuit Courts of Appeals decisions where none exists. In either event, the petition should be denied.

The petitioners' argument -- that the Second Circuit in this case adopted the view that the award of nominal damages is insufficient to prevent mootness -- is a misreading of the decision below. The decision of the Second Circuit in this case never states that the award of nominal damages on the facial challenge to the Student Associations' funding policy mooted the appeal.

The decision of the Second Circuit is explicit that the event which mooted the facial challenge to the Student Association's funding policy occurred in the spring of 2003 when the Student Association abolished the former unwritten funding policy and changed its constitution and policy governing the award of mandatory student activity fee money to RSOs in order to comply with Southworth. Since the Student Association abolished the challenged funding policy two years before the District Court granted summary judgment in August 2005, the petitioners' facial challenge to the funding policy was moot at the District Court level years before the District Judge ruled on the merits of the claim. But the appeal would still have been a live case or controversy under Article III if the petitioners' claim regarding the as applied challenge had continued.

As the Second Circuit correctly held, the event which mooted the appeal was when the petitioner College Standard Magazine stipulated that the as applied challenge to the Student Associations vote on February 12, 2003 to deny petitioners' application for funding was without merit. College Standard Magazine's petition to this Court glaringly omits the stipulation it entered into in the District Court which mooted the appeal. The stipulation plainly provides that with regard to the claim in the complaint that the denial of funding violated the plaintiff's constitutional rights, on which the District Court did not reach any decision on the motion for summary judgment, the plaintiffs College Standard Magazine consents to entry of summary judgment in favor of the defendant Student Association [A-1005]. Since there were only two claims in the complaint, a challenge to the Student Association's funding policy on its face and as applied, and since the facial claim was mooted

when the Student Association superseded its former policy, the Second Circuit correctly held that it was this second event which mooted the appeal and the case.

The petitioners' argument is based on a flawed misreading of the Second Circuit decision. The petition claims the Second Circuit in this case "adopted the contrary view that the award of nominal damages is insufficient to prevent mootness". The Second Circuit decision in this case does not make that holding, and does not support that proposition. The event which caused mootness on petitioners' facial claim was not the stipulation of nominal damages on the facial claim, but the repeal of the unwritten funding policy and adoption of constitutional changes in the Student Association's funding policy which explicitly requires viewpoint neutrality and complies with Southworth, an event which occurred two years before the stipulation. "But the funding policy challenged by the plaintiffs is no longer in place at SUNY Albany. The Student Association amended its constitution in the spring of 2003 to include regulations on funding that explicitly require viewpoint neutrality..... We are thus asked to consider the constitutionality of a funding policy that is no longer in effect, and that is not alleged to have caused the plaintiffs harm when it was in effect. This we cannot do." College Standard Magazine, supra, 610 F3d at 34.

According to the Second Circuit's decision in this case, the facial challenge may have became moot when the Student Association amended its constitution to comply with Southworth in the spring of 2003. According to the concurring opinion, the facial challenge definitely became moot at that time. The real issue is whether the parties failure to raise

mootness in the District Court and subsequent stipulation to nominal damages can revive the petitioners' facial claim and somehow give it new life, even though there was no longer an Article III case or controversy about the facial claim. The Second Circuit correctly held that the answer is clearly "no".

The effect of the stipulation, consenting to summary judgment in favor of Student Association on the as applied claim, which the petitioners downplay and even omit to attach to the petition, was to moot the second claim regarding the petitioners' as applied challenge to the Student Association's vote on February 12, 2003 to deny funding for College Standard Magazine's publication. According to the Second Circuit decision, it was this event that made the appeal moot because then all claims stated in the complaint were both moot.

The petitioners' argument that in this case the Second Circuit has sided with other Circuit Courts of Appeals in holding that an award of nominal damages is insufficient to produce mootness, and that the Second Circuit's decision in this case creates a "split" in the Circuits, is simply false.

The Second Circuit has always held that an award of injunctive relief or nominal damages is sufficient to prevent mootness. Van Wie v. Pataki, 267 F.3d 109, 115 fn. 4 (2d Cir. 2001) ("We note that had the plaintiff sought money damages in addition to their request for injunctive relief, this controversy would not be moot. Indeed, for suits alleging constitutional violations under 42 U.S.C. s 1983, it is enough that the parties merely request nominal damages."); Dawes v. Walker, 239 F3d 489, 497 (2d Cir. 2001)(Walker, C. J., writing separately); Diesel v. Town of Lewisboro, 232 F3d 92, 108 (2d Cir. 2000). There is nothing in the decision in this case to hint of

a change in the Second Circuit's long-standing law that a claim for nominal damages is sufficient to avoid mootness.

The petitioners' argument, that the Courts of Appeals have become "deeply divided" over whether the availability of nominal damages prevents a case from being moot, is a strawman which petitioners have conjured up. In point of fact the Second Circuit's stance is identical to the Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals in holding that a claim for nominal damages is sufficient to present a case or controversy under Article III for judicial review in the district court and appellate levels. The petitioners' argument that the Courts of Appeals have "disagreed" over this issue is disingenuous and contrived to entice this Court to grant certiorari to resolve a difference in the Circuits which does not exist. There is no majority rule and minority rule, the law is absolutely clear in all the Circuit Courts of Appeals that a claim for nominal damages does prevent mootness.[4]

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[4] The petitioners' argument that the Sixth Circuit has adopted a rule contrary to all of the other Circuits, based on the decision in one case, Morrison v. Board of Education of Boyd County, 521 F3d 602 (6th Cir. 2008), is extremely doubtful. In numerous cases the Sixth Circuit has held or indicated that a claim for nominal damages is sufficient to preclude a finding of mootness. See Morrison, supra, 520 F3d at 615 (Moore, J., dissenting [collecting cases]). The majority decision in Morrison holds that the plaintiff had no standing because there was no actual chill or injury-in-fact under the First Amendment. Morrison, supra, at 608- 611. As an alternative ground for dismissal, the majority discusses the issue of "redressability" of whether nominal damages would redress the plaintiffs' alleged injury. However, the underlying fact of this discussion seems to be that the school board's policy was no longer in existence and therefore the claim

The petitioners' argument that the decision of the Second Circuit has "pernicious effects" in First Amendment cases where the government possesses unbridled discretion to determine access to a forum is completely erroneous. College Standard Magazine's petition to this Court is not about any injury to petitioners, because College Standard Magazine has conceded that there was no injury, but is really about attempting to bludgeon college students with large counsel fee awards cases by invoking 42 USC 1988(b) in meritless civil rights litigation. Petitioners' argument that they were without the ability to prove actual viewpoint discrimination [see Petition at p.15] should be regarded as a further admission, in addition to the stipulation consenting to summary judgment in favor of the Student Association on the as applied claim, that their case had no merit from the beginning.

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for nominal damages was moot. See Morrison, supra, at 610-611. As pointed out by the dissenting opinion, "I think the majority opinion mistakenly camouflages a belief that the case is moot in a discussion of redressability, resulting in an opinion that misinterprets standing doctrine and is silent with respect to relevant precedent concerning mootness doctrine." Morrison, supra, at 622-623 (Moore, J., dissenting). In subsequent cases the Sixth Circuit has held that a claim for nominal damages based on a constitutional violation does prevent mootness on appeal. Pagan v. Village of Glendale, 559 F3d 477 (6th Cir. 2009). It appears that the majority decision in Morrison may simply be an erroneous deviation from the rule in the Sixth Circuit. Regardless, if the Sixth Circuit has adopted erroneous rule, there is no reason to grant certiorari in this case where the Second Circuit has ruled correctly and consistently with the other Circuits and with the precedents of this Court.

College Standard Magazine's argument in their certiorari application that the Second Circuit's decision "essentially allow[s] governmental officials to use the judicial system to gauge the lawfulness of policy, and then at the last second moot the challenge by amending the offending policies" [see Petition at p.16] is certainly not what happened in this case. The facial challenge was clearly moot by May 14, 2003 when the Student Association amended its funding policy [A-74, A-340-375, A-595-597, A-617-619]. The facial challenge was clearly moot before the District Court issued a ruling denying the plaintiff College Standard Magazine's motion for a preliminary injunction on June 9, 2003, because the Student Association had already abolished the prior unwritten policy on earlier in the spring of 2003.

College Standard Magazine's argument is spurious. Although the District Judge was made aware that the facial challenge was moot, and he acknowledged that Student Association's policy had been changed before granting summary judgment [A-904], the defendant Student Association did not attempt to duck a decision on the merits of the First Amendment claims. The defendant Student Association never raised the issue of mootness in either the District Court nor the Second Circuit because the Student Association wanted a ruling on the merits. The Student Association was also prepared to go through trial of the as applied claim, but the plaintiff College Standard Magazine wanted to avoid a trial and entered into the stipulation consenting to summary judgment in favor of the defendant Student Association.

The image the petitioners seek to create, that the Student Association suddenly repealed the challenged policy "at the last second" in order to moot

this case, is completely false and misleading. The Student Association abolished the challenged funding policy in the spring of 2003, more than two years before the cross-motions for summary judgment. During that two-year period, the petitioner College Standard Magazine sat on its hands and never applied for additional funding and did little or nothing to move the case forward to final judgment. When confronted with a trial, College Standard Magazine opted to moot out their remaining as applied claim by entering into the stipulation admitting summary judgment in favor of the Student Association.

Throughout the litigation the Student Association sought a ruling on the merits that it was not a state actor and, if it was a state actor, that its written and unwritten policies were consistent with the First Amendment and its denial of funding to College Standard Magazine had been made on a content neutral basis. The defendant Student Association sought a decision on the merits in order to define its obligations under the First Amendment in allocating mandatory student activities fee money to RSOS. The Second Circuit sua sponte raised the issue of mootness at oral argument for the first time. The petitioners' real complaint is that the Second Circuit enforced the case or controversy requirement in Article III and refused to issue an advisory opinion, or perhaps their real complaint is that they don't like the decision of this Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598, 606 (2001).

II. THE PETITIONERS' CLAIM IS BARRED BY THE BUCKHANNON DECISION

Although the petition for certiorari bemoans the plight of plaintiffs who are barred by the so-called minority rule from vindicating their constitutional rights "because defendants may dodge both judgment and [attorneys] fees by eleventh hour evasive maneuvers" [Petition at pp.13-14], even if the non-existent minority rule were in effect, the petitioners do not face this problem because in this case College Standard Magazine could not recover their costs and attorneys fees based on Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 US 598, 606 (2001).

Buckhannon established that the fee shifting provisions, which permit courts in their discretion to award reasonable attorney's fees to the prevailing party, may not be awarded based on the catalyst theory, simply because the plaintiff achieves the desired result where the defendant government enacted a voluntary change in the defendant's conduct. Buckhannon, supra, 532 US at 601-602, 606. One of the reasons why the catalyst theory was rejected was in order to avoid a litigation within a litigation over the motivation for the government's change in policy so that a plaintiff could obtain an award of attorney's fees. The Buckhannon decision held that a request for attorney's fees should not result in a second major litigation to determine the motivation for a government's change in policy. Buckhannon, supra, 532 US at 609-610.

The petitioners claim that "The catalyst theory is not at issue here" [Petition at p. 17] is flatly wrong. The exact opposite is true. The sole reason the petitioners are pursuing certiorari is to attempt to

trivialize Buckhannon and open up government to awards of attorneys fees in cases which are truly moot. In this case, the petitioners seek to penalize the Student Association by forcing the students to pay College Standard Magazine's attorneys fees.

However, an award of attorney's fees would clearly be barred to petitioners under Buckhannon. In order to obtain an award of attorney's fees, the petitioners would have to establish that their lawsuit caused the Student Association to change its policy in the spring of 2003. This would be an impossible burden for the petitioners to prove, since it would not be true.

The record shows that prior to commencement of the lawsuit, in the fall of 2002 the University administration at the State University at Albany had informed the students on the Student Association's executive committee of the Southworth decision and the need for the Student Association to allocate mandatory student activity fee money on a content neutral basis [A-552-553, A-857-860], and the process of amending the Student Association's constitution and policies had already begun. The Student Association amended its constitution in the spring of 2003, shortly after the administration had alerted the Student Association to Southworth and coincidentally shortly after petitioner Barea followed through on his threat to sue the Student Association. In order for the petitioners to obtain an award of attorney's fees, College Standard Magazine would have to prove that it's lawsuit had motivated the Student Association to amend its constitution. This would require a hearing involving a three-part test: whether College Standard Magazine's claim was colorable rather than groundless, whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's

change in conduct, and whether the defendant's change in conduct was motivated by the plaintiffs threat of victory rather than threat of expense. See Buckhannon, supra, 532 US at 610. This is precisely the inquiry which Buckhannon forbids. Since the petitioners are barred from recovering attorneys fees even if they were to win the appeal on the merits, in this respect there is no actual case or controversy under Article III for this Court to consider on certiorari.

III. THE PETITIONER'S HAVE WAIVED THEIR RIGHTS TO CLAIM ANY INJURY AND HAVE NO STANDING

Even if there were a disagreement among the Circuits, which there is not, the petitioners have waived their rights and have no standing because College Standard Magazine has stipulated that it was not injured and sought to appeal solely in order to get a decision on the merits in which, since they were not successful in obtaining a decision on the merits, they did not prevail. Finally the petitioners failed to raise the argument concerning Article III standing now made in their petition before the Second Circuit. Having failed to make their arguments that nominal damages do prevent mootnes in the Second Circuit, the petitioners have waived this point by failing to preserve this argument for review in this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny certiorari.

Dated: Albany, New York
March 21, 2011

Respectfully submitted,
/S/

Lewis B. Oliver, Jr. Esq.
Counsel for Respondents
Oliver Law Office
156 Madison Avenue
Albany, New York 12202

APPENDIX

STIPULATION OF SETTLEMENT AND ORDER.....2a

LETTER BRIEF TO HON. THOMAS J. McAVOY.....6a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, AND JULIEN A.M. STARR,

Plaintiffs

-against-

STATE UNIVERSITY OF NEW YORK AT ALBANY, AND THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,

Defendants.

STIPULATION OF SETTLEMENT AND ORDER

CIVIL ACTION NO.
03-CV-0505

HON. THOMAS J. McAVOY

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, as follows:

1. The parties stipulate and agree that, with regard to the claim in the complaint that the defendant Student Association's policies for allocating mandatory student activity fee money to recognized student groups in effect on February 14, 2003 were unconstitutional on its face, the plaintiffs are entitled to an award of nominal damages in the amount of one dollar ($1.00)

upon the Court's determination set forth in the transcript of the Court's bench Decision on June 3, 2005 at pages 6 to 8. Notwithstanding plaintiffs consent to summary judgment in favor of defendants on the separate claim set forth in paragraph 3 below, plaintiffs reserve the right to argue that the facts surrounding the February 13, 2003 vote denying funding illustrates bow defendants' policies were unconstitutional on its face as set forth in the bench Decision; and

2. The parties stipulate and agree that the stipulation as to the amount of damages in paragraph 1 above is solely for the purpose of fixing the amount of damages upon the Court's bench Decision on June 13, 2005. This stipulation of settlement is not an admission of liability by the Student Association, or an admission that the Court's Decision on the motion for summary judgment as to the Student Association's written and/or unwritten policies was correct, and the purpose of this stipulation is solely to fix the amount of damages so that an amended final judgment may be issued and the constitutional issues decided in the said bench Decision may be heard on appeal; and

3. The parties stipulate and agree that, with regard to claim in the complaint that the denial of funding to the plaintiff College Standard Magazine by the vote of Central Council of the Student Association on February 14, 2003 violated the plaintiff's constitutional rights on which the Court did not reach any decision on the motion for summary judgment the plaintiffs hereby consent to entry of summary judgment in favor of defendants; and

4. The Court reserves decision on the issue of attorneys fees to be decided at a later time; and

5. The parties jointly request the Court to enter an amended final judgment amending the Judgment in a Civil Case dated October 18, 2006 and disposing of this case based on the stipulation herein.

DATE: February 2, 2007

/S/
LEWIS B. OLIVER. JR, ESQ.
Bar Roll No. 102303
Oliver & Oliver
Attorney for Defendants
156 Madison Avenue
Albany, New York 12202

DATE: February 1, 2007

/S/
THOMAS MARCELLE, ESQ.
Bar Roll No. 112107
Attorney for Plaintiffs
2E-Comm Square
3rd Floor
Albany, New York 12207

ORDER

This Court, having held conferences in Chambers in Albany with the attorneys for both parties present on June 22, 2006, and on October 11, 2006, and having heard the attorneys for all parties, hereby finds that on the motion for summary judgment the Court did not reach a decision whether the unconstitutional policies of the Student Association were the cause in fact or proximate cause of the Central Council vote to deny funding for plaintiffs on February 14, 2003, and hereby approves the Stipulation of the parties which fixes the amount of damages on the claim decided in the bench Decision on June 13, 2005 and consents to entry of summary judgment in favor of defendants on the claim that was not decided in the
bench decision, and hereby directs the Clerk to enter an amended final judgment accordingly.

IT IS SO ORDERED:

DATE

HON. THOMAS J. MCAVOY
Senior United States Judge
Northern District of New York

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February 2, 2007

Hon. Thomas J. McAvoy
United States District Court,
Northern District of New York
15 Henry Street
Binghamton, New York 13901
Attn: Colleen Ligas

VIA ELECTRONIC FILING
(www.nynd.uscourts.gov)

Re: College Standard Magazine. Jeffrey Scott Barea, and Julien A.M. Starr v. State University of New York at Albany, and the Student Association of the State University of New York at Albany - United States District Court, Northern District of New York
Civil Action No. 03-CV-050S (McAvoy) (Treece)

Your Honor:

I represent the defendant Student Association in the above-entitled matter. This is to respectfully request that Your Honor review the attached

Stipulation of Settlement and Order and, if it should meet with your approval, execute the proposed Order.

As you will recall in a conference in 2005 Staff Counsel to the United States Court of Appeals for the Second Circuit advised the parties that the judgment was non-final and therefore an appeal was premature, and the parties had difficulty in reaching an agreement that would finalize the case. Your Honor held two conferences including the second one in Chambers in Albany on October 11, 2006, and we believed we had reached an agreement that finalized all issues so that we could appeal to the Second Circuit to clarify the constitutional questions raised. The Clerk entered the Judgment in a Civil Case dated October 18, 2006.

Upon review of the Judgment in a Civil Case, Thomas J. Marcelle, Esq., attorney for the plaintiffs, and I believe that the judgment still contains a problem in that it appears to be nonfinal and therefore not appealable. We have again discussed this matter extensively, and we have agreed upon the enclosed Stipulation of Settlement and order. We have executed the stipulation, the original of which is in closed. We believe the proposed stipulation accurately characterizes the bench decision of the Court and solves the problem of finality of all claims, while protecting other interests that have concerned the parties.

Accordingly, Mr. Marcelle and I jointly request that Your Honor review the proposed Stipulation of Settlement and Order and approve same if it is satisfactory to the Court. The Order if approved would direct the Clerk to enter an amended judgment. If Your Honor requires any further information or

directs that changes be made in the Order, of course we will be glad to comply.

Thank you for your consideration and assistance in this matter.

Respectfully submitted,

/S/

Lewis B. Oliver, Jr., Esq.

LBOJ/ms
enc.

cc: Thomas J. Marcelle, Esq.
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